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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LEMA, Defendant and Appellant.	H044128 (Santa Clara County Super. Ct. No. C1357715)

I. INTRODUCTION

Defendant Christopher Lema appeals after a jury found him guilty of second degree murder (Pen. Code, § 187)[1] and found true the allegation that he personally used a deadly or dangerous weapon, a machete, during the commission of the offense (§ 12022, subd. (b)(1)). The trial court sentenced defendant to 16 years to life.

Defendant's sole claim on appeal pertains to the trial court's response to the jury's request for further explanation of the differences between first degree murder, second degree murder, and voluntary manslaughter. Defendant contends that the trial court's response denied him a fair trial and violated his due process rights because it "failed to correctly explain that the crucial difference between voluntary manslaughter and murder is that if a defendant acted in the heat of passion on sufficient provocation then the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

unlawful killing is voluntary manslaughter *even if* the People proved he acted with express malice [or] implied malice . . . ." For reasons that we will explain, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Case*

On May 15, 2013, Demetrius Porter was spending time with Raymond Gonzales in San Jose. The men were homeless and Porter was teaching Gonzales the code of conduct on the streets. They went to the area of Blossom Hill and Snell where they met up with other homeless people and drank all day. Johnny Buzenes and Lauren Eugene Jackson were two of the people Porter and Gonzales socialized with. Buzenes stole some alcohol for them and the group went to a light rail station and continued to drink. At some point Porter tried to smoke a small amount of methamphetamine.

Sometime between 7:00 and 9:00 p.m., Buzenes was acting "flamboyant" or "gay" and tried to give Gonzales a kiss on the cheek. Defendant and someone named "Gilbert" approached the group and Gilbert asked for a lighter. Defendant called Buzenes a " 'fag' " and punched Buzenes in the face multiple times. Porter pushed defendant away from Buzenes and he and Gonzales yelled at defendant to stop. When defendant did not stop, Porter, Gonzales, and Jackson left. Defendant and Gilbert then ran somewhere else.

Porter and Gonzales walked to a dumpster enclosure by a Jack in the Box where homeless people had created a "hang-out spot" with a couch and an umbrella for shade. Gonzales had never been there before, but Porter said that it was a safe place because he was friends with all of the other homeless people in the area. Jackson and a woman were there when Porter and Gonzales arrived. After Jackson and the woman left, Porter fell asleep on the couch with Gonzales sitting next to him. Porter was in a seated position when he fell asleep, leaning to his side. Between one to three hours had passed since the fight at the light rail station. Gonzales tried to wake Porter up because they were

supposed to get pizza. When Porter did not wake up, Gonzales went on his own, leaving Porter there by himself.

As Gonzales was walking out of the enclosure, defendant was walking in. Defendant said something like, " 'Do you want some?' " Gonzales assumed he meant drugs and replied, " 'No.' " Gonzales continued walking until he heard a bunch of wet, whacking sounds coming from the dumpster that made him stop in his tracks. He also heard a pushing sound like someone getting pushed up against a dumpster. Gonzales waited for the noises to stop and then went back into the enclosure. Defendant was leaving as Gonzales entered. Defendant had blood on his face and looked like he was in shock and something had spooked him.

A few minutes had passed from when Gonzales left to get pizza to when he returned to the dumpster enclosure. Gonzales found Porter lying face down with his body mangled and his skull split open. Porter was dead.

Gilbert entered the enclosure behind Gonzales. It was now late, sometime before midnight. Gilbert stayed with Gonzales for the rest of the night and told him that they had to stick together and could not talk about what happened. Gonzales did not try to get help for Porter because he was scared of defendant and Gilbert.

At some point, Jackson woke up in the bushes and went over to the dumpster enclosure and found Porter's body. Porter had a gash on his head and was lying on the concrete in a pool of blood. Jackson went to a nearby store to report what he had seen.

San Jose Police Officer Kevin McClure responded to a call for service at Blossom Hill and Snell at 11:46 p.m. regarding a person assaulted with a machete, but he could not locate the victim. Officer McClure responded to a second call at 1:29 a.m. This time he went to the dumpster enclosure at the Jack in the Box and found Porter lying on his back next to a couch with what appeared to be blood around his head. The officer could see a laceration to one of Porter's hands and a large wound to the right side of Porter's face, shoulder, and neck. Porter's left hand was resting on the couch. Porter's pants were

pulled down to the mid-thigh level, exposing his undergarments. Porter's belt was fastened.

The couch had slash marks that cut through the fabric into the stuffing. The slash marks were on the part of the couch where a person would rest his or her back. Castoff blood spatter was located on the wall above the slash marks on the couch. Officer McClure found a machete with a 22-inch blade on top of some refuse in a dumpster.

Porter died from multiple sharp force injuries to the back of his head, his chin, the back of his left hand, and "almost his entire right side of his neck." The wound to his neck went through the skin, neck muscles, and jugular vein to the cervical spine and would have required a lot of force to inflict. The wounds to Porter's hand were consistent with defensive wounds. Porter's injuries were consistent with having been inflicted by a machete. Porter had a blood alcohol level of .23 percent and a low level of methamphetamine in his blood when he died.

The blade of the machete later tested positive for blood. Porter was determined to be the source of the DNA swabbed from the blade. DNA testing on the machete's handle was inconclusive.

John Culver met defendant for the first time in the parking lot of the Capitol Drive-In in the late evening of May 16, 2013. Defendant was with Georgino Magar. Defendant was acting erratic and scared and appeared to be under the influence of methamphetamine. Defendant bragged about killing someone with a machete. Defendant said he " 'hacked up a black guy behind Jack in the Box just yesterday.' " Defendant used the term " 'nigger.' " Defendant told Culver that they had gotten intoxicated together and there was some kind of sexual pass going on that he was uncomfortable with, so he went and got a machete and cut the person up. Defendant said that the person offered to buy more alcohol if defendant gave him oral sex. This made defendant really angry and "was pissing him off all night." From what defendant said, the pass was solely verbal and nothing happened physically. It was clear to Culver that

defendant did not have the machete when the sexual advance occurred and that defendant went to go get it and then "went back to where [the guy] was and . . . cut him up." Defendant stated that the unwanted sexual advance was sometime during the day and he returned sometime at night. Defendant said he saw the person behind the dumpster passed out on the couch drunk and "he cut that fucking nigger up." Defendant stated that he had blood all over him. Defendant also told Culver that the police were looking for him and that he was trying to evade them.

Chelsea H.[2] and defendant were acquaintances. For several days in May 2013, when Chelsea was 13 or 14 years old, she and defendant used methamphetamine together. On the evening of May 16, 2013, she was in defendant's car with Georgino Magar at the Capitol Drive-In's parking lot. Defendant arrived late at night. Defendant's t-shirt was bloody and he was having a panic attack about going to jail. Defendant told Chelsea that he had a machete and he killed somebody. Defendant described the victim as a black, homeless man who lived behind a dumpster near Jack in the Box. Defendant stated that the victim had tried to rape him and had pushed him up against a wall. Defendant was shaking, crying, and speaking in a panicked tone. Defendant told Chelsea that he had just reacted.

Magar told police that he was friends with defendant and had known him since high school.[3] On May 16, 2013, Magar was waiting for defendant with Chelsea in defendant's car. When defendant got to the car, he looked like he had been in a fight. Defendant's collar was stretched out and his shirt had blood on it. Defendant said, " 'Dude, I just killed somebody,' " and, " ' . . . I'm serious, bro, I just murdered

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[2] The record refers to Chelsea as "Chelsea H." to protect her privacy. We use her first name for clarity.

[3] Magar refused to testify at trial and was deemed unavailable as a witness. San Jose Police Officer Elizabeth Checke interviewed Magar on May 17, 2013, and her preliminary hearing testimony regarding that interview was read into the record at trial.

somebody.' " Defendant stated he used a machete to kill a black guy and that he " 'saw blood flowing from the black nigger's neck.' "

Defendant told Magar that " '[t]he black guy was gay and acting all gay, and wanted [him] to suck his dick for some dope or something.' " Defendant was "mad because the black guy made him 'look like his bitch.' " Defendant also said he was uncomfortable and felt that the black guy had disrespected him " 'hard.' " Defendant left with some guy nicknamed "Chino"[4] and told him, " 'I want to go back to the black nigger and kill him.' " Chino gave defendant a machete. Defendant returned with the machete and killed the black guy.

When defendant was talking to Magar, he appeared to be scared and said that he was afraid to get caught by the police. Defendant took off his shirt and tossed it under the car. Defendant also said, " 'Let's go . . . fuck niggers up,' " and, " 'Let's go cut on other niggers.' " Defendant wanted to be nicknamed "Machete."

B. ***Defense Case***

Defendant did not testify. Defendant called two witnesses in his behalf: an expert in psychology and his mother.

Dr. Rahn Minagawa testified as an expert in child-adolescent psychology and forensic psychology. Dr. Minagawa had reviewed defendant's school records, medical records, and juvenile probation records and had met with defendant three times. Defendant was 19 years old in May 2013.

Dr. Minagawa opined that defendant suffered from autism spectrum disorder, attention deficit hyperactivity disorder, and a depressive mood disorder. Defendant also suffered from methamphetamine and cannabis use disorder. The autism spectrum disorder caused defendant to misinterpret social cues and the attention deficit hyperactivity disorder caused him to react impulsively in a threatening and aggressive

[4] Magar told Officer Checke that Chino and Gilbert were the same person, but the police were never able to identify Chino or Gilbert.

manner. The combination of the two disorders caused him to misinterpret social cues and then react impulsively. Dr. Minagawa testified that he would expect someone with defendant's history of mental health conditions who used an excessive amount of methamphetamine over a four-day period to be prone to rage, aggression, paranoia, and reactivity.

Defendant's mother, Karen King, testified that defendant had trouble interacting with others as a child. As he got older, impulsivity became an issue and he would display anger when he felt anxious or scared. Defendant was diagnosed with "PTSD," "ADHD," and autism spectrum disorder. He last received mental health treatment when he was 16 years old. Defendant's anger, anxiety, hyperactivity, and impulsivity worsened in his late teenage years.

C. *Charges, Verdict, and Sentence*

Defendant was charged with murder (§ 187). It was also alleged that defendant personally used a deadly and dangerous weapon, a machete, during the commission of the offense (§ 12022, subd. (b)(1)).[5]

On August 25, 2016, a jury found defendant guilty of second degree murder and found the deadly and dangerous weapon allegation true. The trial court sentenced defendant to 16 years to life.

III. DISCUSSION

During its deliberations, the jury requested the trial court to "[p]lease help to further explain, in laymans terms, the differences between 1) murder in the first degree, 2) murder in the second degree, [and] 3) voluntary manslaughter. Please also be certain to further clarify, in laymans terms, a) malice aforethought, cooling off period, and provocation and what the consequences of ones actions means." As relevant here, the trial court responded by stating that "the distinction between murder and voluntary

[5] Defendant's father was charged with dissuading or attempting to dissuade a witness (§ 136.1, subd. (c)(1)), but the charge was severed before trial.

manslaughter is that murder requires malice aforethought, while voluntary manslaughter does not require malice aforethought," and referring the jury back to CALCRIM Nos. 520, 522, and 570.

Defendant contends that the trial court's response denied him a fair trial and violated his due process rights because it "failed to correctly explain that the crucial difference between voluntary manslaughter and murder is that if a defendant acted in the heat of passion on sufficient provocation then the unlawful killing is voluntary manslaughter *even if* the People proved he acted with express malice . . . and even if they proved he acted with implied malice . . . ." Defendant asserts that the trial court's response was "overly simplistic" and constituted "an incorrect instruction . . . ." The Attorney General counters that defendant's claim has been forfeited because he failed to object to the response below and that the trial court's response was accurate and not an abuse of its discretion.

A. *Trial Court Proceedings*

The trial court instructed the jury on the general principles of homicide using CALCRIM No. 500. The court told the jury that "[h]omicide is the killing of one human being by another. Murder and manslaughter are types of homicide. The defendant is charged with murder. Manslaughter is a lesser offense to murder. . . ."

The trial court instructed the jury on first and second degree murder with CALCRIM No. 520. The instruction stated that the People had to prove that when defendant acted, he "had a state of mind called malice aforethought." The instruction further provided: "There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life;

[¶] AND [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time."

The trial court instructed the jury on first degree murder with a modified version of CALCRIM No. 521,[6] which defined the elements of willfully, deliberately, and with premeditation, and instructed on provocation with CALCRIM No. 522. The provocation instruction told jurors that "[p]rovocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

The trial court instructed the jury on voluntary manslaughter committed in the heat of passion using a modified version of CALCRIM No. 570. The instruction stated: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] . . . [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of

[6] At defendant's request, the following language was added to CALCRIM No. 521, the pattern instruction on first degree murder: "The brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation."

provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. The provocative conduct by the victim may have been physical or verbal. An average person need not have been provoked to kill, just to act rashly and without deliberation. [¶] If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

During its deliberations, the jury requested the trial court to "[p]lease help to further explain, in laymans terms, the differences between 1) murder in the first degree, 2) murder in the second degree, [and] 3) voluntary manslaughter. Please also be certain to further clarify, in laymans terms, a) malice aforethought, cooling off period, and provocation and what the consequences of ones actions means."

The trial court "endeavored" with counsel to respond to the jury's request. Before submitting the typed response to the jury, the court asked whether counsel were "in agreement both to the language and to the procedure that we're going to use" and "to the words that we've used." Both counsel stated, "Yes, your honor."

The trial court responded to the jury's request: "In response to Questions One and Two: murder in the first degree requires premeditation and deliberation, while murder in the second degree does not require premeditation and deliberation. Please also refer to

CALCRIM 520 and 521. [¶] In response to Question Three: the distinction between murder and voluntary manslaughter is that murder requires malice aforethought, while voluntary manslaughter does not require malice aforethought. With respect to clarifying malice aforethought please see the definitions of express malice and implied malice found in CALCRIM 520. [¶] With respect to 'Cooling off period' in Question Three, please refer to CALCRIM 200 which in part reads, 'Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.' [¶] With respect to 'provocation' in Question Three, please refer to CALCRIM 200 which in part reads, 'Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. . . .' For the legal definition and explanation of provocation, please refer to CALCRIM 522 and CALCRIM 570. [¶] With respect to the phrase 'consequences of one's actions' in Question Three, please refer to CALCRIM 200 which in part reads, 'Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. . . .' For the legal definition and explanation of the phrase, 'consequences', please refer to CALCRIM 521."

B. *Analysis*

1. Defendant's Claim Has Been Forfeited

A trial court "is under a general obligation to 'clear up any instructional confusion expressed by the jury,' but '[w]here . . . the original instructions are themselves full and complete, the court has discretion . . . to determine what additional explanations are sufficient to satisfy the jury's request for information.' [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 802 (*Dykes*).) "When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal. [Citations.]" (*Ibid.*)

Defendant agreed to the trial court's response to the jury's request for further explanation of the differences between first degree murder, second degree murder, and voluntary manslaughter, and the Attorney General contends that defendant forfeited the claim. Citing section 1259,[7] defendant argues that the forfeiture doctrine does not apply because the response constituted an erroneous instruction on the law that affected his substantial rights.

In *People v. Marks* (2003) 31 Cal.4th 197, 236, the jury submitted a note to the trial court during penalty phase deliberations asking, " ' "If a juror(s) comes to the conclusion that the aggravating circumstances far outweigh the mitigating circumstances must the juror(s) then automatically choose the death penalty?" ' " The trial court responded by reading an excerpt from a CALJIC instruction. (*Ibid.*) On appeal, the defendant contended that the response violated his rights under the United States and California Constitutions because it " 'failed to correctly answer' " the jury's question. (*Id.* at pp. 236-237.) The California Supreme Court determined that "[t]he instruction [was] a correct statement of law, . . . and if defendant favored further clarification, he needed to request it. His failure to do so waives this claim." (*Ibid.*)

For the reasons we explain below, we determine that the forfeiture rule applies because defendant failed to object to the trial court's response or request clarifying language, and the response was "a generally correct and pertinent statement of the law" given after " 'full and complete' " instructions. (*Dykes*, *supra*, 46 Cal.4th at p. 802.)

As relevant here, the trial court responded to the jury's request for further explanation of the differences between murder and manslaughter by stating that "the distinction between murder and voluntary manslaughter is that murder requires malice aforethought, while voluntary manslaughter does not require malice aforethought." The

[7] As relevant here, section 1259 provides: "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

court also directed the jury to refer to CALCRIM Nos. 520, 522, and 570, which it had already provided.

"California statutes have long separated criminal homicide into two classes, the greater offense of murder and the lesser included offense of manslaughter." (*People v. Rios* (2000) 23 Cal.4th 450, 460 (*Rios*).) Murder is "the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "Malice exists, if at all, only when an unlawful homicide was committed with the 'intention unlawfully to take away the life of a fellow creature' (§ 188), or with awareness of the danger and a conscious disregard for life (*ibid.*; [citations])." (*Rios, supra*, at p. 460.) Manslaughter, on the other hand, is "the unlawful killing of a human being *without malice*." (§ 192, italics added.)

The California Supreme Court has often stated that "[a] defendant *lacks malice* and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense"—the unreasonable but good faith belief in having to act in self-defense. [Citations.]' " (*People v. Blakely* (2000) 23 Cal.4th 82, 87-88, italics added; see also *People v. Lasko* (2000) 23 Cal.4th 101, 108 (*Lasko*); *People v. Barton* (1995) 12 Cal.4th 186, 199.) The court has explained that provocation and imperfect self-defense are "mitigating circumstances [that] reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by negating the element of malice that otherwise inheres in such a homicide [citation].' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) The court has also stated when discussing the People's burden of proof that "[t]he possibility that the defendant killed with malice, and thus committed the greater offense of murder, does not prevent a conviction of voluntary manslaughter, a lesser included offense *which does not require proof of malice*." (*Rios*, *supra*, 23 Cal.4th at p. 463, fn. omitted, italics added.) In addition, Witkin observes that all murder except felony murder "require[s] 'malice aforethought,' " whereas "[v]oluntary manslaughter is distinguishable in that it does not

involve malice." (1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012), Crimes Against the Person, § 185.)

Based on the foregoing authorities, we conclude that the trial court's response that "the distinction between murder and voluntary manslaughter is that murder requires malice aforethought, while voluntary manslaughter does not require malice aforethought" is a correct statement of the law. In fact, the response mirrors the first sentence of CALJIC No. 8.50, which states that "[t]he distinction between murder [other than felony-murder] and manslaughter is that murder [other than felony-murder] requires malice while manslaughter does not," and the prosecutor referenced that instruction during the trial court's conference with counsel on the jury's request.[8] Although the trial court could have elaborated on the distinction between murder and manslaughter by reading the entirety of CALJIC No. 8.50, "[i]f defendant wished to . . . clarify the information conveyed by the court, defense counsel should have requested . . . clarification." (*Dykes, supra,* 46 Cal.4th at p. 803.)

Moreover, we conclude it is not "reasonably likely" the jury would have understood the trial court's response in the manner suggested by defendant. (*Dykes, supra,* 46 Cal.4th at p. 804.) Defendant asserts that the trial court's response "left the

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[8] CALJIC No. 8.50 is entitled, "CALJIC No. 8.50 Murder and Manslaughter Distinguished." The instruction states in its entirety: "The distinction between murder [other than felony-murder] and manslaughter is that murder [other than felony-murder] requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation,] [or] [in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,] the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder [other than felony-murder] and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel] [or] [in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury]."

jurors free to conclude that proof of malice aforethought meant [his] crime had to be second degree murder" even if there was proof that he acted in the heat of passion.

However, " '[i]nstructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) We consider the instructions as a whole and in the context of the entire charge (*People v. Haskett* (1990) 52 Cal.3d 210, 235), and " ' " 'we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given' " ' " (*People v. Landry* (2016) 2 Cal.5th 52, 95).

Defendant's argument overlooks that in its response, the trial court instructed the jury to consult CALCRIM Nos. 520, 522, and 570. CALCRIM No. 520 defined murder as "an act that caused the death of another person" committed with "*a state of mind called malice aforethought*." (Italics added.) CALCRIM No. 522 told the jury that "[p]rovocation may *reduce* a murder from first degree to second degree and may *reduce* a murder to manslaughter" and that "[i]f you conclude that the defendant *committed murder* but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter." (Italics added.) CALCRIM No. 570 told the jury that "[a] killing that *would otherwise be murder* is *reduced* to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion." (Italics added; see *People v. Beltran* (2013) 56 Cal.4th 935, 956 (*Beltran*) [CALCRIM No. 570 "properly set[s] out" the relevant mental state for voluntary manslaughter].) The instruction also stated that "[t]he People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

Taken together, CALCRIM Nos. 520, 522, and 570 instructed the jury that a killing committed with malice aforethought is *reduced* to voluntary manslaughter if the perpetrator committed the act in the heat of passion. Moreover, CALCRIM No. 570 explicitly told the jury that it had to find defendant not guilty of murder if the People did not prove beyond a reasonable doubt that defendant did not kill in the heat of passion.

In sum, we conclude that defendant's claim has been forfeited because defendant agreed to the trial court's response to the jury's request and the response was a correct statement of the law given after complete instructions. Moreover, we determine that the response was not reasonably likely to be understood as defendant claims.

2. Even Assuming Error, Defendant Was Not Prejudiced

Even if we were to assume that the trial court's response was an incorrect or incomplete statement of the law, we would determine that defendant was not prejudiced because it is not "reasonably probable that a result more favorable to [him] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Defendant contends that the trial court's response constituted federal constitutional error and that prejudice from the error must therefore be assessed under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, which holds that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Defendant asserts that the trial court's "response to the jury's request for clarification on the difference between second degree murder and voluntary manslaughter . . . failed to make clear that the existence of malice aforethought did not foreclose voluntary manslaughter. The failure of the court's answer to achieve that clarity prejudiced [defendant's] chance for a conviction only on that lesser crime and thereby denied him a fair trial and due process of law under the Sixth and Fourteenth Amendments."

However, similar to defendant here, the defendant in *Beltran* claimed that an "ambiguity" in the jury instructions "deprived him of his federal constitutional rights to a jury trial and due process." (*Beltran, supra*, 56 Cal.4th at p. 955.) The instructional issue there involved "what kind of provocation will suffice to constitute heat of passion and reduce a murder to manslaughter." (*Id.* at p. 938.) The California Supreme Court disagreed with the defendant's claim of federal constitutional error, stating that " 'in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836 . . .].' [Citations.] ' "[M]isdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated" in *Watson*.' [Citations.]" (*Id.* at p. 955.)

Similarly, in *Lasko*, the Calfornia Supreme Court reviewed the prejudice from the trial court's erroneous instruction "that voluntary manslaughter requires a finding that '[t]he killing was done with the intent to kill,' " under the *Watson* standard of review because the error constituted a "fail[ure] to properly instruct the jury on a lesser included offense." (*Lakso, supra*, 23 Cal.4th at p. 111.) The court determined that "the trial court . . . instructed the jury on voluntary manslaughter, correctly explaining to the jury that a killing in the heat of passion is not murder. The court erred only in telling the jury that to convict defendant of voluntary manslaughter, the jury had to find that defendant intended to kill the victim. Defendant insists this instruction could have led the jury to conclude that if he lacked an intent to kill, it had to find him guilty of the more serious crime of murder. But, as previously explained, the trial court's instructions taken as a whole do not support this assertion. Thus, the court's instructional error did not violate defendant's federal constitutional rights to trial by jury or to due process of law." (*Id.* at p. 113.)

Here, the error alleged is that the trial court's response "failed to make clear that the existence of malice aforethought did not foreclose voluntary manslaughter." A finding of error in this regard would be a determination that the trial court failed to properly instruct on the lesser included offense of voluntary manslaughter, and as such is properly reviewed under the *Watson* standard. (See *Breverman*, *supra*, 19 Cal.4th at pp. 168-169 [the California "rule requiring sua sponte instructions on lesser included offenses suggested by the evidence is independent of federal law"]; *Beltran*, *supra*, 56 Cal.4th at p. 955; *Lasko*, *supra*, 23 Cal.4th at p. 111; cf. *People v. Thomas* (2013) 218 Cal.App.4th 630, 643-644 (*Thomas*) [failure to instruct the jury that prosecution had the burden to prove the element of malice beyond a reasonable doubt "by proving that sufficient provocation was lacking" constituted federal constitutional error reviewed for prejudice under *Chapman*[9]].)

"[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citation.]" (*Beltran*, *supra*, 56 Cal.4th at p. 956.)

"[T]he factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.

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[9] Unlike in *Thomas*, the trial court here instructed the jury that "[t]he People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

[Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." ' [Citation.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59.) " 'However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . .' [Citation.]" (*Breverman, supra,* 19 Cal.4th at p. 163.)

Based on our review of the record, we conclude it is not " 'reasonably probable' " that defendant would have obtained a more favorable result absent the trial court's assumed error because " 'the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak . . . .' " (*Beltran, supra*, 56 Cal.4th at pp. 955-956.)

Gonzales testified that approximately one to three hours had passed between the fight at the light rail station earlier in the evening of May 15, 2013 and when defendant entered the dumpster enclosure as Gonzales was leaving to get pizza. Gonzales left Porter sleeping on the couch in the enclosure after he could not get Porter to wake up. As Gonzales walked away from the enclosure, he heard sounds like "something hitting flesh." He returned to the enclosure minutes later to find Porter with his skull split open and his body mangled.

Porter died from multiple sharp force injuries, which were inflicted to the right side of his neck, the back of his head, his chin, and his left hand.

Photographs of the crime scene admitted into evidence show Porter lying on the ground in a pool of blood. Porter's body is beside the couch, and his left hand is resting on the couch. The couch is bloody and has a long, slender tear in its fabric, similar to a

slash mark, directly above a large blood stain. Blood spatter is present on the wall directly above the tear on the couch. Photographs of the dumpster within the enclosure show no blood around the dumpster, which is on the opposite side of the enclosure from the couch. Viewed together, the photographs suggest that at least some of Porter's injuries were inflicted while he was on the couch.

When Culver met defendant for the first time late in the evening of May 16, 2013, defendant "bragged [to Culver] about killing somebody" with a machete. Culver testified that defendant told him that when he was hanging out drinking with someone, he became uncomfortable because of "some kind of sexual pass going on . . . ." Defendant described the sexual advance as "a sexual comment as to . . . [defendant] giving [the man] oral sex to get more alcohol." "[N]one of [the sexual advance] was physical." Defendant "went and got the machete . . . and came back and cut him up." From Culver's recollection, the unwanted sexual advance occurred sometime during the day and defendant returned with the machete sometime later at night. It was clear to Culver that defendant did not have the machete when the sexual advance was made. Culver testified that defendant told him that when he went into the dumpster enclosure, he saw Porter "[p]assed out on the couch, drunk" when he "cut him up."

The record also contains evidence that defendant was angry about the sexual pass when he killed Porter, and defendant's friend Chelsea, who was 13 or 14 at the time of the offense, testified that defendant told her he killed someone with a machete because the guy tried to rape him. Chelsea stated that defendant said the victim pushed him up against a wall and he just reacted.

However, defendant's other friend, Magar, told police that defendant said that " '[t]he black [victim] was gay and acting all gay, and wanted [defendant] to suck his dick for some dope or something,' " which corroborated Culver's testimony. Magar stated that defendant "was mad because the black guy made him 'look like his bitch.' " According to Magar, defendant said that he told someone named "Chino" that he

" 'want[ed] to go back to the black nigger and kill him,' " and Chino gave defendant a machete. Defendant returned with the machete and killed the black guy. Defendant expressed concern to Magar about getting caught by the police and also said to Magar, " 'let's go fuck niggers up' " and " '[l]et's go cut on other niggers.' "

Thus, based on Gonzales's testimony and defendant's statements to Culver and Magar, there was strong evidence that defendant returned to the dumpster enclosure some time after any provocation occurred. Gonzales testified that the fight at the light rail station occurred one to three hours before defendant entered the dumpster enclosure, and defendant told Culver and Magar that he got the machete and went back and killed the black man. In addition, Gonzales testified that Porter was asleep when he left him on the couch, and defendant told Culver that the man was passed out on the couch when he assaulted him. The photographs show the bloody couch with a slender tear where a person's back would be and cast off blood spatter on the wall above it, as well as the devastating sharp force injuries to Porter's head, neck, and hand.

For these reasons, we determine that absent the assumed error, a jury is not "*likely*" (*Beltran*, *supra*, 56 Cal.4th at p. 956) to have found that defendant killed Porter as a result of " 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment," ' " especially given the strength of the evidence that " 'sufficient time ha[d] elapsed between the provocation and the fatal blow for passion to subside and reason to return . . . .' [Citation.]" (*Breverman*, *supra*, 19 Cal.4th at p. 163).

IV. CONCLUSION

The judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, J.

I CONCUR:

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ELIA, ACTING P.J.

People v. Lema
H044128

Mihara, J., dissenting.

I respectfully dissent. Unlike my colleagues, I cannot accept the argument that defendant forfeited his challenge to the trial court's response to the jury's question regarding malice. In my view, the trial court's response was not a "generally correct" and "pertinent" response to the jury's question, so the forfeiture rule does not apply. Nor can I agree with my colleagues that the trial court's response was not erroneous because it is not reasonably likely that the jury understood the trial court's response in the manner that defendant maintains it did. Finally, I believe that defendant is correct in maintaining that the trial court's error is properly viewed as federal constitutional error, which the Attorney General has not established was harmless beyond a reasonable doubt. For these reasons, I would reverse the judgment.

I. Defendant Did Not Forfeit This Contention

It is undisputed that defendant's trial counsel did not object to the court's proposed response to the jury's question. The issue is whether, as my colleagues assert, the court's response was "'a generally correct and pertinent statement of the law' given after '"full and complete"' instructions." (Maj. opn., *ante*, at p. 12.)

The jury submitted the inquiry that led to the court's response after the jury had been deliberating for a day and a half. The trial court responded to the jury's question about malice by telling the jury that "the distinction between murder and voluntary manslaughter is that murder requires malice aforethought, while voluntary manslaughter does not require malice aforethought" and referring the jury back to various instructions that had previously been provided. The next day, the jury found defendant guilty of second degree murder.

Defendant's claim is that the trial court's response was erroneous because it "failed to correctly explain that the crucial difference between voluntary manslaughter

and murder is that if a defendant acted in the heat of passion on sufficient provocation then the unlawful killing is voluntary manslaughter *even if* the People proved he acted with express malice because he had the specific intent to kill and even if they proved he acted with implied malice because he knew his actions were dangerous to human life and deliberately acted with conscious disregard for human life." He argues that the court's response to the jury's inquiry "failed to make clear that the existence of malice aforethought did not foreclose voluntary manslaughter."

The Attorney General contends that this claim was forfeited because defendant's trial counsel agreed to the court's proposed response, and my colleagues agree with him. I do not. "When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal." (*People v. Dykes* (2009) 46 Cal.4th 731, 802.) Forfeiture applies when the trial court's instruction was "generally correct and pertinent" to the jury's inquiry. But where the claim on appeal is that the instruction was erroneous, the claim is reviewable on appeal even if the defense did not object below so long as the instruction affected the defendant's substantial rights and the claim is not that the instruction simply required clarification. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475 (*Sattiewhite*); Pen. Code, § 1259.) Here, the trial court's response to the jury's inquiry was equivalent to an instruction, and defendant's claim is not simply that the response required clarification but that it was legally incorrect.

My colleagues' reliance on *People v. Marks* (2003) 31 Cal.4th 197 (*Marks*) is misplaced. In *Marks*, the trial court, in response to a jury question, reread to the jury a portion of an instruction *that it had earlier given to the jury* and which was indisputably both correct and pertinent to the jury's inquiry. (*Marks*, at pp. 236-237.)

The claim on appeal was not that the response was legally erroneous but that the court should have simply responded "'No.'" (*Marks*, at p. 237.) Where the claim on appeal is that an instructional response was erroneous, rather than merely requiring clarification, the claim is not forfeited. (*Sattiewhite*, *supra*, 59 Cal.4th at p. 475.)

II. The Trial Court's Response Was Legally Erroneous

The trial court's instructional response to the jury's inquiry was erroneous. "The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Although the trial court's response was consistent with one sentence of CALJIC No. 8.50, which had not been provided to the jury, the response omitted the remainder of CALJIC No. 8.50, which explained that where an act is done in the heat of passion, "*even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent*." (Italics added.) By doing so, the court provided a highly misleading, gravely incomplete, and inaccurate instruction to the jury suggesting that *proof of malice itself* established that an offense was murder rather than manslaughter. None of the instructions given to the jury originally, in the court's response, or in any of the instructions referenced in the trial court's response told the jury that *heat of passion* ***negates*** *malice*.[1] The ***focus*** of the jury's inquiry was the difference between murder and manslaughter. That difference is whether there is proof of heat of passion and provocation, *not* whether there is proof of malice.[2]

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[1] The court instructed the jury with CALCRIM No. 520, the murder instruction, CALCRIM No. 521, the first degree murder instruction, CALCRIM No. 522, the provocation instruction, and CALCRIM No. 570, the voluntary manslaughter heat of passion instruction, which discusses provocation but does not mention malice aforethought.

[2] As defendant points out, while the CALCRIM instructions given to the jury in this case did not explain the relationship between heat of passion or provocation and malice aforethought, there are CALJIC instructions that do exactly that. CALJIC

"[O]ne who kills upon a sudden quarrel or in the heat of passion lacks malice regardless of whether there was an intent to kill." (*People v. Lasko* (2000) 23 Cal.4th 101, 109 (*Lasko*).) "Thus, a killer who acts in a sudden quarrel or heat of passion lacks malice and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill. Just as an unlawful killing *with* malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill. In short, the presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter." (*Id.* at pp. 109-110.)

The jury instructions here told the jury that an intent to kill established express malice, and the court's response to the jury's inquiry told it that malice precluded voluntary manslaughter. This was an incorrect statement of the law. "Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." (*People v. Beltran* (2013) 56 Cal.4th 935, 942 (*Beltran*).) "[W]hen a defendant acts with an intent to kill or a conscious disregard for life (i.e., the mental state ordinarily sufficient to constitute malice aforethought), other circumstances relating to the defendant's mental state may preclude the jury from

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No. 8.50, for instance, provides: "When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation,] [or] [in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,] the offense is manslaughter. *In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.*" (CALJIC No. 8.50, italics added.) CALJIC No. 8.40, the voluntary manslaughter instruction, provides: "[There is no malice aforethought if the killing occurred [upon a sudden quarrel or heat of passion] [or] [in the actual but unreasonable belief in the necessity to defend [oneself] [or] [another person] against imminent peril to life or great bodily injury].]" (CALJIC No. 8.40.) I urge the CALCRIM committee to consider modifying the corresponding CALCRIM instructions so that they expressly address the relationship between malice aforethought and heat of passion/provocation.

finding that the defendant acted with malice aforethought." (*People v. Bryant* (2013) 56 Cal.4th 959, 970.)

The law is clear that even where a defendant acts with the intent to kill or conscious disregard for human life, as the evidence in this case clearly established, proof of heat of passion in response to provocation negates what would otherwise satisfy the definition of express or implied malice. Yet the trial court's response told the jury essentially the opposite: that proof of malice precluded a manslaughter verdict. The context in which the trial court provided its response belies my colleagues' claim that there was no reasonable likelihood that the jury would understand the court's response as defendant claims. In fact, the context establishes that the jury, which was trying to determine how to distinguish murder from voluntary manslaughter, would likely have construed the court's response as telling it that the presence of malice was the key. Because the trial court's instructional response to the jury's inquiry excluded provocation from the equation without explaining that provocation negated malice, this response was legally erroneous.

III. The Error Was Prejudicial

I disagree with my colleagues as to the proper standard of prejudice. In a murder case in which there is evidence that the killing may have been provoked, the prosecution "must prove *beyond reasonable doubt*" that provocation and heat of passion "were *lacking in order to establish the murder element of malice*." (*People v. Rios* (2000) 23 Cal.4th 450, 461-462, italics added.) In this case, there was evidence that the killing might have been provoked, so the prosecution, in seeking "to establish the murder element of malice," was required to prove that defendant had not acted in the heat of passion and in response to provocation. The trial court's instructional response misleadingly suggested that the malice element of murder could be established *without considering* whether defendant acted in the heat of passion and in

response to provocation. Because the trial court's error concerned an element of murder, rather than merely an element of the lesser included offense of manslaughter, the rule that errors in instructing on a lesser included offense are not federal constitutional error (*Lasko*, *supra*, 23 Cal.4th at p. 111) does not apply.

My colleagues' reliance on *Beltran*, *supra*, 56 Cal.4th 935 is misplaced. In *Beltran*, the jury had been instructed with CALCRIM No. 570 on the elements of voluntary manslaughter. CALCRIM No. 570 told the jury: "'In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.'" (*Beltran*, at p. 954.) During deliberations, the jury sent an inquiry to the trial court that specifically identified its subject as CALCRIM No. 570, the court's instruction on the elements of voluntary manslaughter. The inquiry asked essentially whether it was sufficient that a reasonable person would have acted rashly or whether it must be the case that a reasonable person would have killed. (*Beltran*, at p. 945.) The trial court responded: "'The provocation involved must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion that his judgment or reasoning process was obscured. This is an objective test and not a subjective test.'" (*Beltran*, at p. 945, fn. omitted.)

The defendant contended that the trial court's response was ambiguous, and the Attorney General took the position that the correct standard was whether a person of average disposition would have *killed*. (*Beltran*, *supra*, 56 Cal.4th at p. 949.) The California Supreme Court rejected both of these positions. It held that the correct standard was whether a person of average disposition would have acted rashly and that the trial court's response was not ambiguous. (*Beltran*, at pp. 949, 954.) However, the California Supreme Court noted that the arguments by counsel to the jury "may have confused the jury's understanding of the court's instructions." (*Beltran*, at p. 955.)

Because of that confusion, the trial court's response to the jury's inquiry, which did not directly answer the jury's question, failed to "'clarify'" the point. (*Ibid*.) Noting that instructions on a lesser included offense are reviewed under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*), the California Supreme Court concluded that it was not "reasonably probable that any possible ambiguity engendered by counsel's argument misled the jury." (*Beltran*, at p. 956.)

There is simply no similarity between the nature of the alleged error in *Beltran* and the nature of the erroneous instructional response in this case. Here, the trial court gave a legally erroneous instruction on the difference between murder and manslaughter that implicated the prosecution's burden to prove the malice element of murder. In *Beltran*, the trial court gave legally correct instructions on manslaughter but the arguments of counsel may have created an ambiguity that the trial court did not explicitly resolve in response to the jury's inquiry. Any error in the *Beltran* trial court's response to the jury's inquiry was not a federal constitutional error because it did not directly involve an element of murder, but here the trial court's erroneous instruction did constitute federal constitutional error because it did directly involve the malice element of murder.

Because the trial court's instructional response to the jury's inquiry in this case had the effect of relieving the prosecution of its burden of disproving heat of passion and provocation in order to establish the malice element of murder, this instructional error was not concerned solely with the lesser included offense of manslaughter, but actually concerned the malice element of the charged murder offense. It follows that the court's erroneous instructional response, misdescribing an element of a charged offense, was federal constitutional error. (*People v. Thomas* (2013) 218 Cal.App.4th 630, 643.) I would therefore agree with defendant that the error is reviewed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

The *Chapman* standard of review requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, 386 U.S. at p. 24.) "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 (*Yates*), disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates*, at pp. 403-404.) "[T]he appropriate inquiry is 'not whether, in a trial that occurred without the error, a guilty verdict would *surely* have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 2081, 124 L.Ed.2d 182], italics original.)" (*People v. Quartermain* (1997) 16 Cal.4th 600, 621; accord *People v. Neal* (2003) 31 Cal.4th 63, 86.)

Defendant contends that the trial court's response to the jury's inquiry was prejudicial in this case because the "manner of killing" indisputably demonstrated express and/or implied malice and the court's response told the jury that the presence of malice precluded a voluntary manslaughter verdict. Defendant argues: "For the jurors to fairly evaluate whether appellant's crime was voluntary manslaughter rather than murder under that state of the evidence, they had to understand that their decision depended solely on their evaluation whether appellant acted in the heat of passion on sufficient provocation from the victim's unwanted sexual advances and that the existence of malice aforethought did not block them from determining that he did."

The Attorney General, who bears the burden of showing that the error was harmless beyond a reasonable doubt, makes no effort to satisfy this burden. He does not even consider whether this is the proper standard of review but simply assumes

that the error is reviewed under *Watson*. The Attorney General argues that the court properly gave the standard CALCRIM instructions and that the evidence of murder "was overwhelming." He claims that the evidence established the "absence of any reasonable provocation" and an "extended cooling off period" after the sexual advance, which precluded the jury from finding that the killing was voluntary manslaughter rather than murder.

The Attorney General's argument fails to establish beyond a reasonable doubt that the jury's murder verdict was not influenced by the trial court's response to the jury's inquiry. The timing and nature of the jury's inquiry and the court's response are of critical importance. The jury had been deliberating for a day and a half before it submitted an inquiry largely focused on the differences between murder and voluntary manslaughter. After the court gave its erroneous response, the jury reached a murder verdict after only a few more hours of deliberations.

"[I]f jury instructions are important in general, there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 252-253.) In addition, the prosecutor's argument to the jury encouraged it to reach precisely the incorrect conclusion that the trial court's erroneous response permitted the jury to make: that the presence of an intent to kill, thereby proving express malice, eliminated the possibility of a voluntary manslaughter verdict.[3]

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[3] The prosecutor argued to the jury that the "wounds" defendant inflicted on Porter "reveal purpose. They reveal aim. They reveal the intent to kill." "He had the intent to kill. He had the intent to kill." "He intended to kill." The prosecutor argued that voluntary manslaughter "is not available under this evidence" because "[i]t isn't enough that he was simply provoked." "It's intent to kill. It's not a voluntary manslaughter. It's intent to kill." "He aimed straight for the head. His aim was to kill."

Although the defense case for voluntary manslaughter was weak, I cannot conclude *beyond a reasonable doubt* on this record that none of the jurors would have entertained a reasonable doubt about whether defendant had killed Porter in response to a sexual advance that would have caused a reasonable person to act rashly. There was substantial evidence that Porter had made some sort of sexual advance toward defendant, and the nature of the advance was the subject of conflicting testimony. Chelsea testified that defendant had told her that Porter pushed him up against a wall and tried to "rape" him. The time between the advance and the killing was also the subject of conflicting testimony from a group of witnesses who were admittedly high on drugs or very intoxicated at the time and had difficulty remembering when any of the events had occurred.

Under these circumstances, I believe that we are compelled to reverse the judgment because the Attorney General has failed to establish that the trial court's error was harmless beyond a reasonable doubt.

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Mihara, J.

People v. Lema
H044128